

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:07-CR-133-BO-1
No. 7:11-CV-145-BO

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|------------------------------|---|--------------|
| HENRY RAYFORD PRIVETTE, JR., |) | |
| Petitioner, |) | |
| |) | |
| v. |) | <u>ORDER</u> |
| |) | |
| UNITED STATES OF AMERICA, |) | |
| Respondent. |) | |

This matter is before the Court on Petitioner's Motion to Alter or Amend Judgment pursuant to Rule 59(e) [DE 86].¹ Petitioner asks the Court to amend its earlier judgment and issue the writ, contending that the government was in violation of the Court's order directing it to answer or make such other response as appropriate to Petitioner's § 2255 motion [DE 67].

The decision to alter or amend a judgment is committed to the discretion of the district court, and the Fourth Circuit has recognized three bases for granting such a motion: when the court is shown (1) an intervening change in controlling law; (2) new evidence that was not available at trial; or (3) that the court has committed a clear error of law or manifest injustice. *See e.g. Robinson v. Wix Filtration Corp., LLC*, 599 F.3d 403, 407 (4th Cir. 2010). Petitioner, *pro se*, has not cited to a change in controlling law or to any new evidence, so the Court will consider his motion as though he contends that it committed a clear error of law or manifest injustice.

Even liberally construed, Petitioner's motion identifies no clear error of law or manifest injustice. The Court's 16 August 2012 order provided the government with forty days within which answer the petition or make such other response as appropriate. The government filed its motion

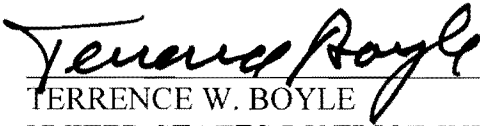
¹The Court notes that, though Petitioner has noticed an appeal in this matter, it retains jurisdiction to consider the instant motion. Fed.R.App.P. 4(a)(4)(B)(i).

to dismiss within the appropriate time period. A motion to dismiss for failure to state a claim must be made before pleading if a responsive pleading is allowed. Fed.R.Civ.P. 12(b)(6). Accordingly, the government's filing of a 12(b)(6) motion was an appropriate response to this Court's 16 August order.

CONCLUSION

Petitioner has identified no basis upon which the Court would find it necessary or appropriate to alter or amend its judgment. Petitioner's Motion to Alter or Amend Judgment is therefore DENIED.

SO ORDERED, this 20 day of August, 2012.



TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE